JOHAR MUSTAPHA

v.

PP

COURT OF APPEAL, PUTRAJAYA
GOPAL SRI RAM JCA
AHMAD MAAROP JCA
SULAIMAN DAUD JCA
[CIVIL APPEAL NO: J-05-56-2003]
13 MAY 2008

CRIMINAL LAW: *Dangerous Drugs Act 1952 - Section 39B(1) - Trafficking in 19,152 g cannabis - Appeal against conviction and death sentence - Whether trial judge rightfully considered demeanor of accused - Whether accused in mere possession and not trafficking in drug*

The accused appealed against his conviction and death sentence under s. 39B(1)(a) of the Dangerous Drugs Act 1952 ('the Act'). The facts showed that the accused was travelling in a car when he went off the road while avoiding another vehicle. When PW5 and his friends went to help the accused, he had shooed them away. PW5 then saw the accused open the trunk of the car, remove a bag ('the said bag') and throw it away. PW5 became suspicious and made a call to the police and whilst doing so, PW5 observed that a tow truck had arrived at the scene but then later moved away. When the police eventually arrived, the accused, upon seeing them, tried to run away. However, he was apprehended and the said bag recovered was found to contain 19,152 grams cannabis.

Held (dismissing the appeal):
Per Gopal Sri Ram JCA delivering the judgment of the court:

(1) The demeanor of an accused when confronted by the police is relevant and admissible under s. 8 of the Evidence Act 1950 (*Om Prakash Bakshi v. State*). The accused's complaint about the use to which the learned judge put this evidence, *ie*, the appearance of the accused when approached by PW5 and his friends, was without merit. (paras 7 & 8)

(2) In respect of the fact that the accused took flight upon seeing the police, there are several authorities that state the proposition that mere flight by an accused is not evidence of

A his or her guilt. But in those cases flight was the only circumstance under discussion. In the present case, there were other pieces of evidence that must be considered together with the evidence of the accused's flight from the scene. When thus treated, the accused's conduct lends weight to the inference
B that he knew that the said bag contained the proscribed drug in question. (para 9)

(3) The issue of credibility is one of fact for the trier of fact to determine (*Andy Bagindah v. PP*). There was no appealable
C error or misdirection on the learned judge's part in the way he assessed or evaluated the evidence of the several witnesses before him. The learned judge admirably discussed the facts and the irresistible inferences that fell to be drawn from the primary facts. (paras 10 & 11)

D

(4) In respect of the accused's argument that he merely had possession of the proscribed drug and was not guilty of trafficking in it, the facts showed that the accused was, at the material time, travelling from the direction of Segamat to Yong
E Peng with the said bag in the car. Hence, he was conveying the drug from one place to another. His evidence that the said bag was never in his car was contradicted by PW5 whose evidence was accepted by the learned judge. It followed that the accused was not in mere passive possession but was
F committing an overt act in conveying or transporting the drug in question. He was therefore trafficking in the said drug. (para 12)

Bahasa Malaysia *Translation Of Headnotes*

G Tertuduh merayu terhadap sabitan dan hukuman mati yang dijatuhkan ke atasnya di bawah s. 39B(1)(a) Akta Dadah Berbahaya 1952 ('Akta'). Fakta menunjukkan bahawa tertuduh dalam perjalanan dalam sebuah kereta apabila kereta tersebut terbalik di tepi jalan ketika mengelak sebuah kereta lain. Apabila
H PW5 dan kawannya pergi untuk membantu tertuduh, tertuduh telah mengusir mereka. PW5 kemudian melihat tertuduh membuka but kereta, mengeluarkan sebuah beg ('beg tersebut') darinya dan membaling beg tersebut keluar. PW5 merasa syak dan terus menelefon polis. Sementara itu, PW5 juga melihat sebuah lori
I penarik tiba di tempat kemalangan tetapi kemudian beredar begitu sahaja. Apabila polis sampai, tertuduh, sebaik melihat mereka, cuba

melarikan diri. Tertuduh bagaimanapun berjaya ditangkap dan beg tersebut yang dilemparkan beliau didapati mengandungi 19,152 gram kanabis.

Diputuskan (menolak rayuan)
Oleh Gopal Sri Ram HMR menyampaikan penghakiman mahkamah:

(1) Tingkah laku seorang tertuduh bilamana terserempak dengan polis adalah relevan dan boleh diterima-masuk di bawah s. 8 Akta Keterangan 1950 *(Om Prakash Bakshi v. State)*. Bantahan tertuduh mengenai penggunaan keterangan ini oleh yang arif hakim, iaitu keadaan tertuduh bila didatangi oleh PW5 dan kawan-kawannya, adalah tidak bermerit.

(2) Berhubung fakta bahawa tertuduh melarikan diri apabila melihat polis, terdapat beberapa autoriti yang menonjolkan proposisi bahawa perbuatan melarikan diri semata-mata oleh seorang tertuduh bukan keterangan mengenai kebersalahannya. Namun, dalam kes-kes tersebut, melarikan diri adalah satu-satunya halkeadaan yang dibincangkan. Dalam kes semasa, terdapat beberapa utas keterangan lain yang perlu dipertimbang bersama-sama dengan keterangan tertuduh melarikan diri dari tempat kejadian. Ditimbang sedemikian cara, kelakuan tertuduh menjadi alasan untuk mencapai inferens bahawa beliau tahu bahawa beg tersebut mengandungi dadah terlarang yang berkenaan.

(3) Isu kredibiliti adalah satu isu fakta yang perlu diputuskan oleh pengadil fakta *(Andy Bagindah v. PP)*. Tiada kekhilafan boleh dirayui atau salah arahan berlaku di pihak yang arif hakim berkaitan cara beliau menimbang dan menilai keterangan saksi-saksi di hadapannya. Yang arif hakim telah mengupas fakta-fakta serta inferens-inferens tidak dapat tidak yang boleh dibuat dari fakta-fakta penting dengan baik sekali.

(4) Berhubung hujah tertuduh bahawa beliau hanya mempunyai milikan dadah terlarang dan tidak mengedar dadah tersebut, fakta menunjukkan bahawa tertuduh adalah, pada waktu material, dalam perjalanan dari Segamat ke Yong Peng dengan beg tersebut berada di dalam kereta. Oleh itu, beliau telah membawa dadah dari satu tempat ke tempat yang lain. Keterangannya bahawa beg tersebut tidak pernah berada di dalam keretanya telah dipatah oleh keterangan PW5 yang diterima oleh hakim bicara. Ianya mengikut bahawa tertuduh

A bukan semata-mata mempunyai milikan pasif tetapi telah melakukan satu perbuatan terang-terangan membawa atau mengangkut dadah berkenaan. Beliau dengan itu telah mengedar dadah tersebut.

B **Case(s) referred to:**
Chan Chwen Kong v. PP [1962] MLJ 307 ***(refd)***
Om Prakash Bakshi v. State [1989] Cr LJ 1207 ***(refd)***
Andy Bagindah v. PP [2000] 3 CLJ 289 CA ***(refd)***

Legislation referred to:
C Dangerous Drugs Act 1952, s. 39B(1)(a)
Evidence Act 1950, s. 8

For the accused - Kamarul Hisham (Ahmad Zaidi Zainal with him); The Chambers of Kamarul Hisham & Hasnal Rezua, M/s Ahmad Zaidi & Partner
D *For the prosecution - Nurulhuda Nur'aini Mohd Noor; Peguam Negara Malaysia*

[Appeal from High Court Muar; Criminal Trial No: 45-21-2000]

Reported by Usha Thiagarajah
E

JUDGMENT

Gopal Sri Ram JCA:

F **[1]** This is the judgment of the court.

[2] On 2 May 1999 at about 9pm, PW5 was seated at a food stall at Cha'ah located at the 132.5 km along the Johor Bahru-Segamat Road. He was with his friends. At about that time he noticed a white car coming from the direction of Segamat towards
G Yong Peng go off the road while avoiding another vehicle. This happened across the road from where he was seated. He saw a man later identified as the accused (the appellant before us) emerge from the car. PW5 and his friends went towards the accused. They wanted to help him. They were concerned to see
H if he was alright. But the accused acted rather strangely. He shooed them away. They then returned to the food stall. PW5 saw the accused open the trunk of the car, remove a blue bag and throw it away. He became suspicious and telephoned the police. While making the phone call, PW5 observed the accused
I standing alone near the car. About half an hour later, a tow truck arrived at the scene but then moved away. Shortly after that the

police arrived in a Land Rover. On seeing them the accused began to run away. He was apprehended. PW5 then assisted PW6 (Corporal Rosli Hamid) who was among the police personnel who had arrived at the scene. He narrated to PW6 what he had witnessed and pointed in the direction in which the bag had been flung. The bag was then recovered. It was produced as exh. P6B at the trial. PW6 opened the bag. From within it was recovered a substance which upon subsequent chemical analysis was found to be 19,152 grams of cannabis. The accused was later charged with the offence of trafficking under s. 39B(1)(a) of the Dangerous Drugs Act 1952 ("the Act"). He was convicted and sentenced to death. He has now appealed to us.

[3] The main thrust of the accused's submissions is that the learned judge misdirected himself in finding that the accused knew that exh. P6B contained the proscribed drug in question, that is to say, that the accused had "*mens rea* possession" of the drug. Our attention was drawn to the following individual circumstances upon which the learned judge relied in arriving at his conclusion on this part of the case. First, that the accused had opened the trunk of the car, removed exh. P6B and thrown it away. Second, that he had chased away PW5 and those with him who had come forward to help. Third, that the accused look nonplussed when approached by PW5 and his friends. Fourth, that he had run away upon seeing the police. Learned counsel for the accused took us through a minute examination of the conflicting testimonies of the prosecution's witnesses on each of these elements. He submitted that the evidence of the witnesses concerned was at best equivocal and certainly wanting in credibility. The learned judge was criticised by learned counsel for the former's evaluation of the testimony of these witnesses.

[4] Now, it is true that when each circumstance set out earlier is examined individually it does not establish *mens rea* possession. But the essence of circumstantial evidence is not the strength of each individual strand of evidence. It is the combined effect of all the relevant circumstances when taken together that matters. As Thomson CJ said in *Chan Chwen Kong v. Public Prosecutor* [1962] MLJ 307:

> That evidence was entirely circumstantial and what the criticism of it amounts to is this, that no single piece of that evidence is strong enough to sustain the conviction. That is very true. It must however be borne in mind that in cases like this where the evidence is wholly circumstantial what has to be considered is not only the strength of each individual strand of evidence but also the combined strength of these strands when twisted together to form a rope. The real question is: is that rope strong enough to hang the prisoner?

[5] In his written judgment the learned judge painstakingly analysed the several individual circumstances and considered them together. He asked himself the right question as follows:

> The obvious question is whether the accused were aware that he was driving a car with a package containing cannabis in the boot. Obviously, the accused must be consciously moving drugs from one place to another, if he were aware that he was driving a car with a package containing drugs in the boot

[6] This is a correct direction of himself. So far as the analysis of the circumstantial evidence is concerned we can detect no error. However, for the purpose of demonstrating that the learned judge's judgment does not contain any misdirection on this part of the case we will discuss two particular circumstances upon which learned counsel placed much emphasis when making complaint about the way in which the learned judge dealt with them.

[7] The first of these is the appearance of the accused when approached by PW5 and his friends. It is settled that the demeanor of an accused when confronted by the police is relevant and admissible under s. 8 of the Evidence Act 1950. An illustrative case is *Om Prakash Bakshi v. State* [1989] Cr LJ 1207. In that case, some policemen were on their beat when they saw the petitioner and his co-accused arguing about a book. Each was snatching it from the other. When confronted by the police they became nonplussed. This fact was taken into account by the High Court when dismissing the accused's petition to revise the sessions court's decision in the following terms:

> both the accused were in possession of the book containing the morphine and both were nonplussed when confronted by the police. So, from this circumstances a *prima facie* view can be taken that both the co-accused were having the knowledge that the book contained the morphine

[8] We therefore find the accused's complaint about the use to which the learned judge put this evidence to be without merit. A

[9] We now turn to the second item of evidence. This has to do with the fact that the accused took flight upon seeing the police. We are aware of the several authorities which state the B proposition that mere flight by an accused is not evidence of his or her guilt. But if you examine the cases in which this has been said you will find that flight was the only circumstance under discussion. But that is not the case here. In the present instance there are other pieces of evidence which must be considered C together with evidence of the accused's flight from the scene. When thus treated, the accused's conduct lends weight to the inference that he knew that exh. P6B contained the proscribed drug in question.

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[10] The other line of attack mounted by the accused in this appeal is, as we have already said, the way in which the learned judge assessed or evaluated the evidence of the several witnesses. Now the issue of credibility is one of fact for the trier of fact to determine. As Shaik Daud JCA said when delivering the judgment E of this court in *Andy bin Bagindah v. Public Prosecutor* [2000] 3 CLJ 289:

> There is no dearth of authorities to say that in every case, there are bound to be contradictions and discrepancies. The question to be decided by the trial judge is whether those contradictions and/ F or discrepancies are material ones so as to strike at the very root of the charge. It is for the trial judge to consider this since he was the one who saw and heard the evidence. In the present case the learned judge concluded that there were discrepancies but those discrepancies were not material ones. Since this involved the credibility of witnesses, we held that the learned judge was a G better person to decide and an appellate court ought not to interfere with such findings.

[11] We have scrutinized with great care the totality of the evidence presented before the learned judge and his treatment and H analysis of it. Having done so we are unable to detect any appealable error or misdirection on his part. On the contrary, the learned judge has admirably discussed the facts and the irresistible inferences that fell to be drawn from the primary facts.

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[12] There is one final point which we must address. It was suggested by learned counsel for the accused during argument that at best his client merely had had possession of the proscribed drug and was not guilty of trafficking in it. With respect we are unable to agree. There is a vital piece of evidence considered by the learned judge to which we must now advert that demolishes the accused's argument. It is this. The accused was at the material time traveling from the direction of Segamat to Yong Peng with exh. P6B in the trunk of his car. Put differently, he was conveying the proscribed drug from one place to another. His evidence that exh P6B was never in his car was contradicted by PW5 whose evidence was accepted by the learned judge. Hence, the accused was not in mere passive possession but was committing an overt act in conveying or transporting the drug in question. He was therefore trafficking in the said drug.

[13] For the reasons already given, we find this appeal to be without merit. It is dismissed. The conviction and sentence passed by the High Court are affirmed.